IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HON'BLE THE CHIEF JUSTICE MR.H.L.DATTU
&
THE HONOURABLE MR. JUSTICE K.T.SANKARAN

THURSDAY, THE 14TH JUNE 2007 / 24TH JYAISHTA 1929

WA.No. 1450 of 2004()

AGAINST THE JUDGEMENT IN OP.12979/2003 Dated 20/07/2004

APPELLANTS: RESPONDENTS 1 & 2:
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1. THE ASSISTANT COMMISSIONER OF INCOME TAX, CIRCLE-(1(2), RANGE I, ERNAKULAM.

2. THE RECOVERY OFFICER, ERNAKULAM.

BY ADV. SRI.P.K.R.MENON(SR.),SR.COUNSEL FOR IT
SRI.GEORGE K. GEORGE, SC FOR IT

RESPONDENTS: PETITIONER & RESPONDENT NO.3:
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1. J.C.AUGUSTINE, G.346,
PANAMPILLY NAGAR, KOCHI 682 015.

2. THE SENIOR DIVISIONAL MANAGER,
LIFE INSURANCE CORPORATION OF INDIA
DIVISIONAL OFFICE, JEEVAN PRAKASH,
M.G.ROAD, ERNAKULAM-1.

BY ADV. SRI.MATHAI M.PAIKADAY (SR.)
R1 BY ADV. SRI.MOHAN PULIKKAL
R2 BY ADV. SRI.S.EASWARAN

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 14/06/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

H.L. DATTU, C.J. & K.T. SANKARAN, J.

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W.A. No. 1450 OF 2004

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Dated this the 14th June , 2007

J U D G M E N T

H.L. Dattu, C.J.:

This appeal is filed by the Revenue, being aggrieved by the common judgment of the learned single Judge in O.P.Nos. 1798 of 2000 and 12979 of 2003 and W.P.(C) 9866 OF 2004. Since the issues involved in the said cases are common, the learned single Judge had clubbed all the three cases and disposed of by a common judgment dated 20.07.2004,

2. The facts, as noticed by the learned single Judge, are as under:

The petitioner before the single Judge is an income tax assessee. For the assessement years 1990-91, 1991-92 and 1992-93, the assessing officer had completed the assessment and had demanded income tax, for a sum of Rs. 78,45,838/- along with interest. He had also demanded an additional amount of income tax of Rs. 9,62,240/- on the basis of the additional income disclosed by the assessee.

After completion of the assessment proceedings by the authorities under the Income Tax Act ('Act' for short), the assessee had filed an

application before the Settlement Commission, under Section 245C of the Act. Before the Settlement Commission , the assessee had also made an application for allowing him to remit the additional income tax of Rs.9,62,240/- in instalments. The Settlement Commission, by its order dated 19.07.1999 had passed an order under section 245D(1) of the Act. While doing so, the Settlement Commission had issued the following orders and directions, the same is as under:

> *"8. In accordance with the provisions of section 245D(2A) of the Income Tax Act, the appellant shall pay, within 35 days of the receipt of this Order, the additional amount of income tax payable on the income disclosed in the settlement application and furnish proof of such payment to the Settlement Commission and its Assessing Officer, within 15 days of making the aforesaid payment. If the applicant does not pay the additional amount of income tax payable within the time specified in Section 245D(2A) of the Income Tax Act, the amount of income tax remaining unpaid, together with the interest payable thereon under section 245D(2C) of the Income Tax Act, shall be recovered by the Assessing Officer in accordance with the provisions of section 245D(2D) of the Income Tax Act."*

Thereafter, the assessee had paid the first instalment of Rs. 1,17,155/- on 30.12.1999. The assessee had also remitted an amount of

Rs.65,000/- . While the matter was pending before the Settlement Commission, since the assessee had defaulted in paying the instalments, the assessing officer had passed Ext.P8(a) (in O.P.1798 of 2000) order of attachment dated 30.12.1999. Aggrieved by the said order, the assessee was before this court in O.P. 1798 of 2000.

Subsequently, the assessing officer had also issued Ext.P8 (in O.P. 12979 of 2003) letter dated 18th March 2003 to the Branch Manager of the LIC of India, interalia requesting the Branch Manager to pay to him any amount due to the assessee. Aggrieved by the said action of the assessing officer, the assessee was before this court in O.P.12979 of 2003 .

Since there was default in payment of instalments granted, the Settlement Commission had cancelled the instalment facility granted to the assessee by order dated 09.02.2004 (Ext. P6 in W.P.(C) 9866 of 2004). Aggrieved by the said action of the Settlement Commission , the assessee was before this Court in W.P.(C) 9866 of 2004.

3. As we have already noticed, since the assessee was common in all these cases and the issues were also common, the learned single Judge had disposed of the cases by a common judgment, holding that in view of Section 245F of the Act, once the matter is seized by the Settlement

Commission , the assessing officer cannot proceed to recover any amount ordered to be paid, by the Settlement Commission . According to the learned single Judge, it is the exclusive jurisdiction of the Settlement Commission, once an application is filed by the assessee under section 245C of the Act . That only means, the jurisdiction of the assessing officer is ousted once an application is pending before the Settlement Commission. To arrive at this conclusion, the learned single Judge has relied upon Sec. 245 F of the Act. Aggrieved by the findings and conclusions reached by the learned single Judge, the Revenue is before us in this Appeal.

4. Learned Senior Counsel appearing for the Revenue would strenuously contended before us, that the findings and conclusions reached by the learned single Judge requires re-consideration by this court.

5. Percontra, learned counsel appearing for the assessee sought to justify the impugned order passed by the learned single Judge.

6.. Chapter XIX A of the Act provides for settlement of cases. Section 245 A of the Act defines certain expressions. Section 245B speaks of constitution of the Settlement Commission by the Central Government. Section 245BA provides for jurisdiction and powers of

Settlement Commission. Section 245 C of the Act provides for filing of an application by an assessee for settlement of cases before the Settlement Commission . Section 245 D of the Act provides for procedure on receipt of an application under section 245C of the Act.

7. Sub-section (1) of Section 245D of the Act authorises the Settlement Commission, to take cognizance of an application filed by an assessee and also authorises the Settlement Commission to reject the said application under certain circumstances. Once an application is entertained, the Settlement Commission can proceed to pass an order, after affording an opportunity of hearing to the assessee or his representatives. Sub-section 2 of Section 245D of the Act mandates that an order made under sub-section (1) shall be communicated to the applicant and to the Commissioner. Sub-section(2A) of Section 245D of the ACt provides that subject to the provisions of sub-section (2B) of Section 245D, the assessee shall pay, within thirty five days of the receipt of a copy of the order under sub-section (1), the additional amount of income tax payable on the income disclosed in the application and shall furnish proof of such payment to the Settlement Commission. Sub-section(2B) of the Act authorizes the Settlement

Commission to extend the time for payment of the amount which remains unpaid or allow payment thereof by instalments, on an application made by the assessee giving sufficient reasons for his inability to pay the additional amount of income referred to in sub-section (2A).

8. For the purpose of this case, provisions of sub-section (2D) of Section 245D of the Act requires to be noted. It is extracted and reads as under:

> *"(2D) Where the additional amount of income-tax referred to in sub-section (2A) is not paid by the assessee within the time specified under that sub-section or extended under sub-section (2B), as the case may be, the Settlement Commission may direct that the amount of income-tax remaining unpaid, together with any interest payable thereon under sub-section (2C), be recovered and any penalty for default in making payment of such additional amount may be imposed and recovered, in accordance with the provisions of Chapter XVII, by the Assessing Officer having jurisdiction over the assessee.*

9. At this stage, it is also relevant to refer to Section 245F of the Act and its provisions, which is as under :

> *"245F:* ***Powers and procedure of Settlement Commission****:-*

(1) In addition to the powers conferred on the Settlement Commission under this Chapter, it shall have all the powers which are vested in an income-tax authority under this Act.

(2) Where an application made under section 245C has been allowed to be proceeded with under section 245D, the Settlement Commission shall, until an order is passed under sub-section (4) of section 245D, have, subject to the provisions of sub-section (3) of that section, exclusive jurisdiction to exercise the powers and perform the functions of an income tax authority under this Act in relation to the case.

(3) Notwithstanding anything contained in sub-section (2) and in the absence of any express direction to the contrary by the Settlement Commission, nothing contained in this section shall affect the operation of any other provision of this Act requiring the applicant to pay tax on the basis of self assessment in relation to the matters before the Settlement Commission.

(4) For the removal of doubt, it is hereby declared that, in the absence of any express direction by the Settlement Commission to the contrary, nothing in this Chapter shall affect the operation of the provisions of this Act in so far as they relate to any matters other than those before the Settlement Commission.

((5) and (6) (Omitted by the Finance Act, 1987 with effect from 01.06.1987.)

(7) The Settlement Commission, shall, subject to the

provisions of this Chapter, have power to regulate its own procedure and the procedure of Benches thereof in all matters arising out of the exercise of its powers or of the discharge if its functions, including the places at which the Benches shall hold their sittings. "

10. Placing reliance primarily on this provision, the single Judge is of the opinion that during the pendency of the application before the Settlement Commission , the assessing officer should not have issued Ext. P8 (a) dated 30.12.1999 (in O.P. 1798 of 2000), Ext .P8 dated 18.03.2003 (in O.P. 12979 of 2003) and Ext. P6 dated 09.02.2004 (in O.P. 9866 of 2004).

11. Section 245J of the Act provides for recovery of sums due under order of settlement. This Section only says that once an order is passed by the Settlement Commission under sub-section (4) of Section 245D of the Act, subject to the conditions imposed therein, the amounts may be recovered and any penalty for default in making payment of such sums may be imposed and recovered in accordance with the provisions of Chapter XVII, by the assessing officer having jurisdiction over the person who made the application for settlement under section 245C.

12. The admitted facts are:

After having quantified the tax liability by the assessing officer for the assessment period 1990-91, 1991-92 and 1992-93, the assessee had filed an application before the Settlement Commission as provided under section 245C of the Act , the petitioner/assessee had moved an application before the Settlement Commission for allowing him to remit the additional income of Rs. 9,62,240/- in instalments.

The Settlement Commission, after considering the request so made, had passed an order dated 19.07.1999. In the said order, the Settlement Commission has granted certain time to the petitioner/assessee to pay the amounts ordered to be paid under section 245D (2A) of the Act. In the very same order, it was also observed that if for any reason , the assessee defaults in paying the amounts, the proceedings under section 245D(2D) of the Act can be invoked by the Assessing Officer having jurisdiction over the assessee, who made the application for settlement before the Settlement Commission.

13. In the instant case, as we have already observed, the assessee is questioning the two orders passed by the assessing officer, viz., the order of attachment dated 30.12.1999 and the letter to the Branch Manager of the LIC dated 18.03.2003 and also the order passed by the

Settlement Commission, cancelling the instalment facilities.

14. Keeping in view the provisions of Section 245F of the Act, but ignoring the provisions of Section 245(2D) of the Act, the single Judge is of the opinion that once the matter is seized by the Settlement Commission, the Assessing Officer has no jurisdiction to issue the aforesaid notice and order. This, in our opinion, may not be justified for the reason that Section 245D(2D) of the Act does authorize the Assessing Officer to proceed against an assessee, if he has committed any default of the instalments payable as ordered by the Settlement Commission under Section 245D(2A) of the Act. At this stage, we further intend to add that the power under Section 245F of the Act is a general power given to the Settlement Commission whereas the power under Section 245D (2D) of the Act are special powers . In the instant case, such power has been exercised by the Assessing Officer.

15. In view of the above, the orders passed by the single Judge cannot be sustained by us. The matter requires to be remanded to the single Judge to decide as to whether the Assessing Officer was justified in issuing the orders of attachment dated 30.12.1999 and the garnishing notice dated 18.03.2003 to the Branch Manager of the LIC and whether the Settlement Commission should have cancelled the instalment

facility granted to the assessee under sub-section (2A) of Section 245D of the Act.

16. With these observations and directions, Writ Appeal is disposed of.

Ordered accordingly.

H.L. DATTU,
CHIEF JUSTICE.

K.T. SANKARAN,
JUDGE.

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